SUPREME FINANCE (M) BHD.

v.

BUKIT BARAT DEVELOPMENT SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C23-2717-86]
5 OCTOBER 1990

LAND LAW: *Third party charge - Order for sale - Land Administrator - Whether judgment under Rules of the High Court 1980 - Whether can proceed with action on personal covenant in same proceedings - Whether guarantor has equity - National Land Code 1965, ss. 253, 256(3), 257(1)(a), 263 - Rules of the High Court 1980, O. 42 rr. 1, 12, O. 83.*

CIVIL PROCEDURE: *Order of sale obtained under charge action - Whether can proceed with action on personal covenant - Whether order for sale is a judgment - Doctrine of merger of actions - Duplicity of proceedings - Circumstances under which leave to defend will be granted - Rules of the High Court 1980, O. 42, rr. 1, 12, O. 83.*

The plaintiffs SF, as third party chargees, sued the 1st defendant, D1 as principal and the 2nd defendant D2 as guarantor under a loan agreement. SF obtained summary judgment against the defendants under O. 14 Rules of the High Court 1980 (RHC). The defendants appeal against the judgment.

It was the contention of the defendants that as an order of sale had been obtained by SF in a charge action to realise the amounts owing, SF should not be allowed to proceed with the action on the personal covenant until the sale of the charged land has been effected. Further that the proceedings on the personal covenant should be limited to the balance, if any, left unpaid after the proceeds of sale had been realised.

The defendants further submitted that an order for sale was a judgment of the Court within the meaning of O. 42 r. 1 of the RHC 1980 and as a result there was a merger of all causes of action open to SF. Therefore it was argued that there was presently a duplicity of proceedings.

The defendant also argued that the order of sale raises an equity in favour of D2 which limits his liability to the balance outstanding after the sale.

Held:

[1] Under s. 253 of the NLC, it is beyond argument that before execution proceedings are initiated, an action has to be commenced in respect of the shortfall and judgment obtained on it is only on such judgment sum that execution proceedings may be initiated.

[2] This view is further fortified by the fact that in a charge held under a Land Office title, the order of sale is obtained from the Land Administrator, LA, who is empowered to order the sale under s. 263 of the NLC which is in *pari materia* with s. 256(3) which gives the Court the power to order a sale of land held under Registry title. It cannot be said that the order of title LA is one on which execution lies and a similar order of sale obtained in the Court under s. 256(3) of the NLC cannot have greater effect that the LA's order.

[3] Based on both the policy of Chapter 3 of Part 16 of the NLC and the authorities, an order of sale pursuant to s. 256(3) of the NLC is not a judgment within the meaning of O. 42 r. 1 of RHC and the doctrine of merger has no application to proceedings under the NLC to enforce a charge.

[4] As against the third party chargor, all that the chargee is entitled to is the statutory remedy of enforcing a sale of the charged land. The question of seeking relief of payment of the monies secured by the charge does not arise as against the chargor.

[5] (a) Order 83 RHC which deals with charge actions seems to provide that in a charge action by the chargee seeking an order of sale of the land charged, the chargee could also asked for an order for payment of the monies secured by the charge;

(b) however it is not the practice in Malaysia to seek the statutory remedy of enforcing the sale as well as judgment or order on the covenant to pay in the same proceedings. This could be attributed firstly to the existence of 3rd party charges and secondly because of the existent of charges held under Land Office titles, that is, where the order of sale is obtained from a LA and not a Court of law.

[6] Even if it is a first party charge and even if it is conceded that accordingly the statutory remedy of obtaining the order of sale of the charged land and the relief of payment of the money secured may be sought in the same action, it is the accepted practice to have separate actions namely, an originating summons for a charge action and a separate writ action for judgment on the convenants; there has been judicial notice of this accepted practice.

[7] (a) Although, there were merits in the defendants' contention that a guarantor has an equity to protest the initiation of a claim against him on the guarantee before the sale is completed, that does not provide the guarantor with a defence or even a triable issue;

(b) all the guarantor can achieve by raising such an equity is to obtain a stay of execution of any judgment that has been obtained against him until the sale is effected or until it has been shown that the sale cannot be effected or that nothing can be realised from the sale, at all or within a reasonable time.

[8] Although a difficult question may be raised, leave to defend will be refused where the point is clear and the Court is satisfied that it is really unarguable.

[Defendant's appeal dismissed.]

Cases referred to:

American International Assurance Co. Ltd. v. Union Builders (M) Sdn. Bhd. [1973] 1 MLJ 95
Bank Bumiputra v. Esah binti Abdul Ghani [1985] CLJ (Rep) 41
Cow v. Casey [1949] 1 KB 481
Earl Poulett v. Viscount Hill [1893] 1 Ch D 277
Haron v. Central Securities (Holdings) Bhd. [1982] CLJ (Rep) 26
Lesco Development Corp. v. Malaysia Building Society [1987] CLJ (Rep) 160
Malaysia Building Society Bhd. v. Lim Kheng Kim [1988] 1 CLJ (Rep) 770
Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd. [1988] 1 CLJ (Rep) 193
MBF Finance Bhd. v. Malaysia Air Charter Co. Sdn. Bhd. [1987] CLJ (Rep) 196
Ng Yik Seng & Anor. v. Perwira Habib Bank Bhd. [1980] 2 MLJ 8
Supreme Finance (M) Ltd. v. Koo Sin Ken [1987] CLJ (Rep) 349
Tengku Farid v. U.A.B. [1985] 2 MLJ 199
Webster v. Bakewell R.D.C. [1916] 115 LT 678
Williams v. Hunt [1905] 1 KB 512

Legislation referred to:

National Land Code 1965, ss. 253, 256(3), 257(1)(a), 263
Rules of the High Court 1980, O. 14, O. 42 r. 1, O. 42 r. 12, O. 83
Rules of the Supreme Court [UK], O. 88

Other source referred to:

Strouds Judicial Dictionary Vol. 3, p. 1802

For the defendants/appellants - K.S. Narayanan; M/s. K.S. Narayanan & Associates
For the plaintiffs/respondents - De Silva; M/s. Chooi & Co.

JUDGMENT

VC George J:

The 1st defendant is sued on a loan agreement; the 2nd defendant is sued as guarantor of what is payable by the 1st defendant.

The writ was caused to be issued on 28 September 1986. A joint statement of defence was filed but an O. 14 application was successfully taken out against both defendants. This appeal by both the defendants is against that O. 14 judgment.

In the statement of defence various defences were taken. In the affidavit in opposition to the O. 14 and in a further affidavit filed after notice of appeal in respect of the O. 14 judgment had been filed the defendants refer to various matters which it is contended provide triable issues.

It was *inter alia* pointed out by the defendants as a salient fact that the loan was secured by a 3rd party charge on lands the chargor being one Plaza Development Sdn. Bhd. and that on 3 May 1986 the plaintiffs had as chargees instituted proceedings (hereinafter referred to as the charge action) and had obtained on the 16 October 1987 an order for sale of the said lands. Apparently there were successive auctions arising from the order of sale each of which was aborted as there were no bidders, the last on 29 March 1989 at the reserve price of RM495,000.

Before me Counsel for the defendants restricted his contentions in effect (as I understood him) to the following submission:

Because an order for sale had been obtained in the charge action to realise the amounts owing, the action on the personal covenant which is for the identical amount should not be allowed to be instituted or in any event be allowed to be proceeded with until the sale of the charged land has been effected. The proceedings on the personal covenant should be restricted only for the balance, if any, left unpaid after the proceeds of sale have been realised.

Complementary to that submission were the further submissions:

(i) The order for sale of 16 October 1987 obtained in the charge action is a judgment of the Court within the meaning of O. 42 r. 1 of Rules of the High Court 1980 (RHC).

(ii) With the obtaining of such judgment there was a merger therein of all causes of action available to the plaintiff in respect of the loan transaction.

(iii) The filing of the writ herein and the said separate charge action proceedings in the civil division of the High Court amounted to duplicity of proceedings.

(iv) In any event since an order of sale had been obtained against the charged lands there rises an equity in favour of the guarantor which entitles him to successfully contend that no action should be taken against him until the auction sale is completed so that what amount (if any) is left to be paid to extinguish the debt is established.

It has to be and I think that it was conceded that the merger point only rises if the order of

sale amount to a judgment. Now, it does not per se follow that because the order for sale is given after the Court has heard the parties that it has to be a judgment pronounced by the Court. For instance directions of various types are frequently sought and obtained from Judges, which directions are clearly orders of the Court but not judgments within the meaning of O. 42 r. 1 even though both parties may have been heard before the orders giving the directions are made. A good test is whether execution proceedings can be instituted on the order made, in this case, the order of sale. Assuming that there was a sale duly effected and assuming there was a shortfall, could the plaintiff proceed to take execution proceedings in respect of the shortfall? It is to be observed that the order made was not for the payment of money but for the sale of the land to be effected. Section 253 is the introductory section to the Chapter in the National Land Code dealing with the Remedies of Chargees and it states:

> The provisions of this chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which the charge relates.

It seems to me beyond argument that before execution proceedings are initiated an action has to be commenced in respect of the shortfall and judgment obtained on it and it is only on such judgment sum that execution proceedings may be initiated.

This view that on the order of sale there is no express or implied order for payment is further fortified by the fact that the charge is on land held under a Land Office title the order of sale is sought and obtained from the Land Administrator whose powers to order the sale is given by s. 263 which provision is in *pari materia* with the provisions of s. 256(3) which is the section that specifically empowers the Court to make an order of sale in respect of land held under a Registry Title. By no stretch of the imagination can such an order of a Land Administrator be said to be one on which execution lies and it cannot but be that a similar order of sale obtained in the Court pursuant to provisions in *pari materia* with the section invoked before the Land Administrator should have any greater effect.

However there is the decision of the *Supreme Court in Supreme Finance (M) Ltd. v. Koo Sin Ken* [1987] CLJ (Rep) 349 (Supreme Finance) where O. 42 r. 12 RHC was applied to an order for sale made pursuant to the National Land Code s. 256(3). It was argued that since O. 42 r. 12 has application only to judgments of the Court, in effect the Supreme Court was of the view that a s. 256(3) order for sale was a judgment and that therefore the doctrine of merger would apply.

In the judgment of the Court in *Supreme Finance* the Supreme Court made a reference to but did not follow the Federal Court's decision in *American International Assurance Co. Ltd. v. Union Builders (M) Sdn. Bhd.* [1973] 1 MLJ 95 (AIA) where the Federal Court has made a distinction between a claim by a chargee on a covenant and one in exercise of the chargee's statutory remedy against the chargor in default.

However a year after *Supreme Finance the Supreme Court in Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* [1988] 1 CLJ (Rep) 193 (*Dhanoa*) said that it was in complete agreement with the Federal Court in its judgment in *AIA* and explained away *Supreme Finance* as being a case involving a judgment debt whereas in *Dhanoa* (and in *AIA*) there was no judgment debt. The judgment at p. 195:

> and since there was no judgment debt the learned Judge was wrong to apply O. 42 r. 12 ... And O. 42 r. 12 of the High Court Rules 1980 has no application to any Court order made pursuant to s. 257 of the National Land Code 1965.

(Section 257 provides for matters to be dealt with on a s. 256(3) order).

Now, a reading of *Supreme Finance* discloses that in fact the order there was one made pursuant to s. 256(3) of the National Land Code. It seems to me that accordingly in effect what *Dhanoa* had held was that if *Supreme Finance* purports to hold that a s. 256(3) order of sale is a judgment to which O. 42 r. 12 applies such a holding is erroneous. In *Malaysia Building Society Bhd. v. Lim Kheng Kim* [1988] 1 CLJ (Rep) 770 Edgar Joseph Jr. J had occasion to direct his mind to *Supreme Finance*, *AIA* and *Dhanoa* and concluded at p. 774:

> This conflict of authority would seem to have been resolved in the recent Supreme Court case of *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* which appears to have restored, at least by necessary implication, the judgment of the Federal Court in the *AIA* case, since it is authority for the proposition that an order for sale under s. 257(1)(a) of the National Land Code is not a judgment debt within O. 42 r. 12, that the doctrine of merger is without application in proceedings under the National Land Code to enforce a charge and the covenanted rate of interest continues to apply until realization notwithstanding the order for sale.

Before moving away from the point reference has to be made to *MBF Finance Bhd. v. Malaysia Air Charter Co. Sdn. Bhd.* [1987] CLJ (Rep) 196 (*MBF Finance*) where *Supreme Finance* was cited with approval. But reading that judgment with the Supreme Court judgment in *Dhanoa* it becomes obvious that the Supreme Court in *MBF Finance* had not directed its mind to the fact that the order in *Supreme Finance* in fact was an order of sale pursuant to s. 256(3) of the National Land Code.

In my judgment both the policy of Chapter 3 of Part 16 of the National Land Code and on authority, an order for sale pursuant to s. 256(3) of the National Land Code is not a judgment within the meaning of O. 42 r. 1 and it follows and in any event in my judgment the doctrine of merger has no application in the context to such an order for sale.

I now move to the duplicity point. *Earl Poulett v. Viscount Hill* [1893] 1 Ch Div 277 and *Williams v. Hunt* [1905] 1 KB 512 were cited.

In the former, Lindley LJ said that a defendant should not be harassed by a separate proceeding for an amount included in what is to be recovered in the former suit. He went on to say:

> What the plaintiffs seek to recover here would be included in the amount for which they will have an order for personal payment in the other action and it would lead to great oppression if a plaintiff was allowed to commence a second action for the purpose of obtaining speedier payment of a part of what is to be recovered in the original action.

In the latter case, Collins MR referred to and followed *Earl Poulett* and said:

> Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is a complete remedy in the Court in which the suit was first started.

It is also relevant and important to note that in *Earl Poulett*, Lindley LJ pointed out that in commencing the earlier action for foreclosure the plaintiff had claimed not only foreclosure "but also, **as the practice has been** since the passing of Judicature Act, a personal order for payment," (Emphasis supplied).

Order 83 RHC deals with charge actions and is an application almost in toto of O. 88 of the

English Rules of Supreme Court. It does indeed appear to provide that in a charge action by the chargee seeking an order of sale of the land charged the chargee could also ask for an order for payment of the moneys secured by the charge. However unlike the practice in England, to which reference was pointedly made by Lindley LJ in *Earl Poulett*, it has not been the practice in Malaysia to seek the statutory remedy of enforcing the sale as well as judgment or order on the covenant to pay, in the same proceedings. In fact in Kuala Lumpur Charge actions are filed in the Civil Division while claims on the covenant to pay are filed in the Commercial Division of the High Court. In any event, unlike the position in *Earl Poulett* and *William v. Hunt* where the defendant was both the mortgagor and covenantor, in the instant case, the 1st defendant is the borrower, the 2nd defendant the guarantor and a 3rd party, *Plaza Development Sdn. Bhd.* the chargor.

In that kind of situation, as against the 3rd party chargor, all the chargee is entitled to is the statutory remedy of enforcing a sale of the charged land. The question of seeking relief for example, of payment of the moneys secured by the charge does notarise as against the chargor. It is perhaps because of the existence of 3rd party charges and because of the existence of charges on land held under Land Office titles where the order of sale is obtained not in a Court of law but from a Land Administrator, that it has not been the practice in Malaysia for the statutory remedy of enforcing the charge and for relief arising out of the covenant to pay, to be sought in the same proceedings.

In my judgment clearly on the facts of the instant case particularly with the charge being a 3rd party charge, the complaint of duplicity is without merit. In any event even if it was a 1st party charge (and assuming that guarantors are not being sued) and even if it is conceded that accordingly the statutory remedy if obtaining the order of sale of the charged land and the relief of payment of the money secured may be sought in the same action, if separate actions are taken out for the respective relief, I would not be prepared to have one or the other of the separate actions struck out for duplicity because I feel that I should recognise what has in effect become the accepted practice in our Courts of having such separate proceedings. It has been authoritatively stated that the Courts can make their own procedure (see for example *Haron v. Central Securities (Holdings) Bhd.* [1982] CLJ (Rep) 26 and the practice we have been having of an originating summons for a charge and a separate writ action for judgment on the covenants by the borrower and/or guarantors will have to be and is given judicial notice as it were of being the accepted practice in Malaysia.

On the last point, the equity that a guarantor has, reliance was placed on *Ng Yik Seng & Anor. v. Perwira Habib Bank Bhd.* [1980] 2 MLJ 83 (*Ng Yik Seng*) and on *Lesco Development Corp. v. Malaysia Building Society* [1987] CLJ (Rep) 160 (*Lesco*).

Lesco does not help in that it was not decided on equities but on it found to be undesirable to allow a situation of two different Courts having to try and determine the same issues between the same parties relating to the same subject matter.

In *Ng Yik Seng* the Federal Court stated its view that where the realisation of the charge would more than pay off the amount owing, the contention that the guarantors should be called upon to meet their guarantee only and if there is a shortfall after the sale of the charged lands "is not without attraction." The Court's view that the contention is attractive is, of course, not a decision. The Court went out to hold as "uncertain" the suggestion that the claim against the guarantor in those circumstances is bad "in law and equity". This holding does not help the appellant here. The Court then drew attention to *Webster v. Bakewell R.D.C.* [1916] 115 LT 678 where the action was dismissed for being a useless piece of litigation. The Federal Court in *NG Yik Seng* went on to state that the matter before them too may

turn out to be a useless piece of litigation "so that a Court may very well in the exercise of its discretion stay, not dismiss, the action until after completion of the sale.

With the greatest respect, contrary to submissions by Counsel, I find that no clear statement on equities is expressed by *Ng Yik Seng*. The reason for this is obvious. It was not a point of contention before the Court. The views expressed in respect of equities were not necessary for the decision of the case and as such is clearly *obita dicta* as was pointed out in *Bank Bumiputra v. Esah binti Abdul Ghani* [1985] CLJ (Rep) 41 (*Esah*). "*Obita Dicta*" has reference to statements made, by the way as it were, in the course of a decision the views expressed in such statements not being necessary for the decision arrived at and such are not to be given the weight of the decision in the case or the grounds of the decision - See *Strouds Judicial Dictionary* Vol. 3 p. 1802 for definition of "*Obita dicta.*"

In *Tengku Farid v. U.A.B.* [1985] 2 MLJ 199 the Supreme Court accepted that in certain circumstances a guarantor has an equity against the creditor. The point was not sufficiently elaborated on no doubt because the Court found that the equities of the sub-purchasers put paid to any equities that the guarantors may have been able to raise.

En. Narayan of Counsel for the defendant has sought to distinguish *Bank Bumi v. Esah binti Abdul Ghani*, he argues that while Esah may be authority for the proposition that the bank has the option to choose whether to proceed against the borrower, the chargor or the guarantor and the bank cannot be dictated to in respect of against whom they should proceed first, esah does not and is not intended to hold that once the bank has moved on the charge and particularly where it has obtained the order for sale the guarantor does not have an equity to protest the initiation of a claim against him on the guarantee before the sale has been completed.

One remembers that the Supreme Court in *Tengku Farid* recognised in certain circumstances the guarantor can raise equities. In my judgment, while there is merit in En. Narayan's contention, I do not think that the effect of the successful raising of the equity provides the guarantor with a defence or even a triable issue. In my judgment all the guarantor can achieve by raising such an equity is to obtain a stay of execution of any judgment that has been obtained against him until the sale is effected or until it has been shown that the sale cannot be effected or that nothing can be realised from the sale, at all or within a reasonable period.

One other observation has to be made. Normally leave to defend should be given where a difficult question of law is raised. However if the point is clear and the Court is satisfied that it is really unarguable, leave to defend will be refused (see per Lord Greene MR in *Cow v. Casey* [1949] 1 KB 481). While there had been a conflict of authority in respect of some of the points raised, such conflict has been now resolved. The position obtaining is that the points raised in this appeal are now really unarguable. The appeal against the O. 14 judgment is dismissed with costs.

Also found at [1991] 2 CLJ 1394